irrelevant to the present proceedings. When the deceased married the first plaintiff he incurred a legal obligation to maintain her and any children of the marriage and she acquired a legal right to be maintained by him and it is immaterial where he obtained the money to discharge his legal duty. It is immaterial whether he got it by working for it or whether he got it from his father or whether he got it in some other way. After all if he had not got it from his father he would have had to go and work for a living instead of spending his time at the University. The point is that in fact the husband was maintaining the wife and children and as a result of his death they have lost that maintenance.

To my mind it is also beside the point to say that a charitable father-in-law and godfather has provided for them and will possibly go on providing for them if they are destitute. The real point is there is no legal obligation on him to provide. The widow has no legal claim on him as she had on her husband. What she has lost is the support she had from her husband to which she was legally entitled. She is, then, clearly entitled to compensation for that loss of support as are the young children.

It was said by Lord Goddard in the case of *Heatley* v. *Steel Co. of Wales, Ltd.*[1]:—

> "The court has, in the best way it can, to find a sum of money which it thinks will fairly compensate the family. One Judge may arrive at it in one way and another Judge in another."

Again, it was said by Morris L.J. in the case of *Scott* v. *Musial*[2]:—

> "if three judges of the Court of Appeal consider that the amount of general damages that they would have awarded would have been a figure different from that decided by the trial judge, they will not, for that reason alone, give preference to their own figure; they will only do so if satisfied that the judge has acted on a wrong principle of law or has misapprehended the facts, or has, for those or other reasons, made a wholly erroneous estimate of the damage suffered."

Now, as I said yesterday there is a very very great element of judgment called for in assessing damages in this type of case. Perhaps this type of case calls for the exercise of judgment more than do other types of case where the damages can be fairly precisely calculated.

In the present case I think had I been the trial Judge I would have awarded a rather lower sum than was awarded but the difference between my own view of what should have been awarded and that of Mr. Justice Neal which he has stated is not so great as to justify me in saying that this Court should interfere.

There is one minor point. Since losing the husband the first plaintiff has been receiving payments from her father-in-law. It was urged upon us that these should be taken into account in assessing the damages. For myself I can find nothing to justify such a view. There is not a scintilla of legal obligation on a father-in-law to maintain his daughter-in-law and grandchildren and the fact that he has taken upon himself a moral obligation which he may cease to discharge at any time does not in my view justify us in taking these payments into account. No doubt the money he has paid will be refunded. That is no concern of the Court. And it does seem an extraordinary proposition that a wrongdoer who has to pay for his wrongdoing (and that is what we are concerned here) should derive an advantage from the charitable disposition of some other person.

For myself I would dismiss the appeal with costs.

Hill J. A. (delivering oral judgment): I would, for the reasons as stated, also dismiss the appeal with costs.

Good J. A. (delivering oral judgment): I am of the same opinion.

So far as the widow's entitlement is concerned, I would like to refer to a sentence in the judgment of Scrutton L.J. in *Baker* v. *Dalgleish Steam Shipping Co.*[3] to which we were referred yesterday. That was a claim for compensation under Lord Campbell's Act and Scrutton L.J. referring to the widow's claim said:

> "She is entitled to claim on the one hand any pecuniary benefit which it is reasonably probable she would have received if the deceased had remained alive."

On the evidence in the present case it is abundantly clear that it was more than reasonably probable, it was a virtual certainty, that the voluntary payments by her father-in-law would have continued if her husband had lived. I therefore hold the view that she is entitled to be compensated on that basis.

So far as the quantum is concerned I respectfully agree with the opinions of My Lords and I have nothing to add.

I, too, would dismiss the appeal with costs.

Appeal dismissed.

Solicitors: *Shearn Delamore & Co.; Murphy & Dunbar.*

LIM KIM SWEE v. TAN MENG SAN

[C. A. (Thomson C.J., Hill and Good JJ. A.) June 17, 1960]

[K. L. — F.M. Civil Appeal No. 27 of 1960]

Contract — Agreement to sell land under charge — Purchaser to pay or settle with chargee — Condition precedent — Whether purchaser must have actually performed his part of the contract to be entitled to sue for specific performance.

Practice and Procedure — No cause of action when writ was issued — Whether writ could be amended after payment to chargee by purchaser so as to treat that payment as something that had been done before writ was issued.

The plaintiff agreed to buy and the defendant agreed to sell a piece of land held under a certificate of title in the Mukim of Ampangan, Seremban. The consideration for the defendant's promise to sell was in two parts. One part was the payment of some money to B. Kaher Singh and the other part was the satisfaction of a debt owed by the defendant to one Coelho who at the time

was a chargee of the land. The plaintiff commenced proceedings for specific performance, alleging in his statement of claim that at all times he was and had been willing and ready to perform his part of the agreement. In his defence the defendant alleged that "it was the plaintiff who committed a breach of the said agreement in that he did not pay the amounts he undertook to pay thereunder or settle S. J. Coelho with the result that the said S. J. Coelho obtained judgment against the defendant". The plaintiff did not, in fact, discharge the defendant's obligation to Coelho until three weeks after the issue of the writ.

The learned trial Judge held that the very nature of the transaction between the parties required performance by the plaintiff, performance not willingness to perform on the part of the plaintiff, before he could call the defendant to carry out his part of the contract; as the plaintiff had not done so at the time of the issue of the writ he was not entitled to succeed. The plaintiff appealed.

Held: (1) it was clearly the intention of the parties that the plaintiff should discharge Coelho's debt and thereby put the defendant into a position to transfer, to give a good registrable transfer free from encumbrances, which until the plaintiff performed the defendant was unable to do. Therefore the plaintiff had no cause of action until his part of the contract was performed;

(2) payment of consideration by the plaintiff after suit brought would not entitle him to specific performance. The plaintiff could not have amended his writ after payment to Coelho so as in effect to treat that payment as something that had been done before the writ was issued.

Appeal dismissed.

Cases referred to:—

(1) *Eshelby* v. *Federated European Bank Ltd.* [1932] 1 K.B. 254, on appeal, *ib*, 429, C.A.
(2) *Tottenham Local Board of Health v. Lea Conservancy Board* 2 T.L.R. 410.
(3) *Creed* v. *Creed* [1913] 1 I.R. 48, 50.
(4) *Original Hartlepool Collieries Co.* v. *Gibb* (1877) 5 Ch. D. 713.

COURT OF APPEAL.

D. G. Rawson for the appellant.
P. P. Nair for the respondent.

Thomson C.J. (delivering oral judgment): This is an appeal from a judgment of Mr. Justice Ismail Khan in an action which arose from an agreement made between the present appellant, who was the plaintiff in the original proceedings, and the present respondent, who was the defendant.

That agreement is dated 30th August, 1958, and under it the plaintiff agreed to buy and the defendant agreed to sell a piece of land held under Certificate of Title No: 4135 for Lot No. 1781 in the Mukim of Ampangan in the District of Seremban, in the State of Negri Sembilan. It is beyond controversy at this stage, if it ever was in controversy, that the consideration for the defendant's promise to sell was in two parts. One part was the payment of some money to a gentleman called B. Kaher Singh and the other part was the satisfaction of a debt owed by the defendant to one Coelho who at the time was a chargee of the land and held the Grant by way of security for that debt which was under a promissory note.

The plaintiff commenced proceedings for specific performance on a date which is not clear, but was certainly prior to 3rd November, 1959, which is the date of the amended Writ of Summons. In his statement of claim he set out the facts relating to the agreement. He alleged that at all times he was and had been willing and ready to perform his part of the agreement and he claimed specific performance of the agreement, or alternatively damages.

In his defence which was filed on 21st November, which was a few days after the issue of the amended writ, the defendant said in one place: "it was the plaintiff who committed a breach of the said agreement in that he did not pay the amounts he undertook to pay thereunder or settled S. J. Coelho with the result that the said S. J. Coelho obtained judgment against the defendant" and he said in another place: "the plaintiff committed breach of the agreement under reference, and he has no right to bring this action".

Now the truth is, and I do not think that has ever been in question, that in fact the plaintiff did not discharge the defendant's obligation to Coelho until 16th December, 1959, that is three weeks after the issue of the Writ.

In the circumstances the learned trial Judge took the view that the case was governed by section 53 of the Contracts Ordinance under which where there are reciprocal promises and the order for their performance is expressly fixed by the contract they shall be performed in that order and where the contract contains no express provision as to the order in which they are to be performed the promises are to be performed in the order which the nature of the transaction requires. He was of the opinion that here the very nature of the transaction between the parties required performance by the plaintiff, performance not willingness to perform on the part of the plaintiff, before he could call the defendant to carry out his part of the contract and he held that in view of the fact that the plaintiff had not done so at the time of the issue of the Writ he was not entitled to succeed. He accordingly dismissed the action with costs but pointed out that that did not in any way prejudice the bringing of a fresh action by the plaintiff. Against that judgment the plaintiff has now appealed.

For myself I am of the opinion that the appeal should be dismissed.

It has been argued in the first place that the settlement of defendant's debt to Coelho by the plaintiff was a condition precedent of the contract and that therefore its non-fulfilment should have been pleaded by the defendant. The answer to that of course is that if it was a condition precedent (I am going to say in a moment or two it went far beyond a condition precedent) it was in fact pleaded by the defendant in the passages in his defence which I have quoted.

It went, however, far beyond being a mere condition precedent. This was not the usual case where there are independent and severable promises, where A promises he will sell and B

promises he will pay. It was a case where the promises were closely connected casually for it was clearly recognised by the parties that the defendant could not perform his part of the contract until after the plaintiff had performed his. It was clearly the intention of the parties that the plaintiff should discharge Coelho's debt and thereby put the defendant into a position to transfer, to give a good registrable transfer free from circumstances, which until the plaintiff performed the defendant was unable to do.

Therefore, in my opinion, the plaintiff had no cause of action until his part of the contract was performed, until he had carried out his promise. Clearly that state of affairs came into existence on 16th December when the plaintiff paid Coelho. It was not, however, in existence on the date on which he issued his Writ.

I observe from the record that at the very end of the proceedings the trial Judge asked counsel for the plaintiff if he could show any authority that payment of consideration after suit brought will entitle him to specific performance. Counsel said he could not get hold of any authority at the moment. Well, I think that had counsel taken the matter further he could not have got hold of any authority because such authority as I have been able to discover is entirely the other way.

There are three English cases and one Irish case on the point, but I do not propose to discuss them further than by referring to the case of *Eshelby* v. *Federated European Bank, Ltd.*[1] which itself deals with the other two English cases and the Irish case. That case was an appeal from the Official Referee which came before a Divisional Court. The facts were that the defendant had agreed to pay certain instalments. He failed to pay the first instalment and his failure was connected with a dispute as to the carrying out of a building contract. A writ was issued for the recovery of the first instalment but by the time the matter came on for trial before the Official Referee the second instalment had become due and the Official Referee allowed the plaintiff to amend his pleadings so as to include a claim for the second instalment which, of course, was not due when the writ was issued.

Both Swift J., and Charles J., were of the opinion that the amendment should not have been allowed and in the relevant portion of his judgment, which is too long for quotation, Swift J., based his opinion on a consideration of the cases of *Tottenham Local Board of Health* v. *Lea Conservancy Board*,[2] *Creed* v. *Creed*[3] and *Original Hartlepool Collieries Co.* v. *Gibb*.[4] With reference to *Creed* v. *Creed, supra*, Swift J., observed (at p. 260):

"Here there was no right on the part of the plaintiff in this action to sue for that second instalment when the action was brought, and *Creed* v. *Creed* is helpful in the absence of any express rule on the matter in our own Courts or in our own Rules of procedure, as showing that such a cause of action cannot be added to the writ here."

These cases to my mind are ample authority for the proposition that in the present case the plaintiff could not have amended his writ after the payment to Coelho so as in effect to treat that payment as something that had been done before the Writ was issued. *A fortiori* he was not entitled to succeed on the Writ as it stood without amendment for clearly when it was issued he had no cause of action.

In the circumstances I would dismiss the appeal with costs.

Hill and Good JJ. A. concurred.

Appeal dismissed.

Solicitors: *Jeff & Co.; P. P. Nair.*

BALWANT SINGH v. PUBLIC PROSECUTOR

[A. Cr. J. (Rigby J.) June 22, 1960]

[Ipoh — Perak Criminal Appeal No. 27 of 1960]

Criminal Procedure — Witness — Corroboration — No independent evidence — Unsafe to convict.

Mental Disorders Ordinance, 1952, s.66(2) — Identification of alleged offender.

A witness cannot corroborate his own testimony and an independent evidence is required to constitute corroboration. In sexual offences it is unsafe to convict where there is no independent evidence even when the complainant is a person of completely sane mind. It is very much more unsafe to convict in a case where the complainant is a patient in a mental home, in the absence of any corroborative evidence whatsoever as to the identification of the alleged assailant.

MAGISTRATE'S CRIMINAL APPEAL.

F. C. Arunalandom for appellant.

Abdul Hamid bin Omar (Deputy Public Prosecutor) for the respondent.

Rigby J. (delivering oral judgment): The appellant was convicted by the learned Magistrate of an offence under section 66(2) of the Mental Disorders Ordinance, 1952, of having sexual intercourse with a person who was a patient and then under treatment at the Central Mental Hospital, Tanjong Rambutan, on the 2nd November, 1959. He was sentenced to two years' imprisonment, and he now appeals against both his conviction and sentence.

The facts of the case are briefly as follows. At about 4 a.m. on the morning of the 2nd November, 1959, a female attendant at one of the female wards at the Central Mental Hospital at Tanjong Rambutan, observed a male person enter the female patients' ward. The person was wearing a white shirt and khaki trousers and had his head swathed in a garment looking like a towel. The person entered the ward and went out again carrying the complainant, who was then a voluntary patient at the hospital. Apparently the female attendant, apart from shouting out, made no attempt whatsoever to pursue the male person who had carried the patient away. About 20 minutes later the disguised person returned to the ward bringing the complainant with him and depositing her at the entrance to the ward. Again apparently the